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Westlands Water District

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

HOOPA VALLEY TRIBE,

Plaintiff,

v.

UNITED STATES BUREAU OF
RECLAMATION; DAVID BERNHARDT, in
his official capacity as Secretary of the Interior;
BRENDA BURMAN, in her official capacity
as Commissioner of the United States Bureau
of Reclamation; ERNEST CONANT, in his
official capacity as U.S. Bureau of Reclamation
California-Great Basin Regional Director; and
UNITED STATES DEPARTMENT OF THE
INTERIOR,

Defendants.

Case No. 1:20-cv-01814-JLT-EPG

**WESTLANDS WATER DISTRICT'S
REPLY IN SUPPORT OF MOTION TO
INTERVENE AS DEFENDANT**

Hearing Date: December 23, 2022
Time: 9:00 a.m.
Courtroom: 4 – 7th Floor, Fresno
Judge: Hon. Jennifer L. Thurston

Trial Date: None
Action Filed: August 13, 2020

REPLY IN SUPPORT OF MOTION TO INTERVENE**I. INTRODUCTION**

In two related cases, this Court has already rejected the primary argument now offered by plaintiff Hoopa Valley Tribe (“Plaintiff”) that, absent a validation judgment, Westlands Water District (“Westlands”) lacks a “legally protected interest” in its repayment contracts (“Repayment Contracts”) and thus it should not be a party. Westlands is already a defendant in *N. Coast Rivers All. v. Dep’t of the Interior*, 1:16-cv-00307-JLT-SKO (“NCRA”) and *Ctr. for Biological Diversity v. Bureau of Reclamation*, 1:20-cv-00706-DAD-EPG (“CBD”). In each of those cases, the Court held that Central Valley Project (“CVP”) water contractors have legally protected interests in repayment contracts with the United States executed pursuant to the Water Infrastructure Improvements for the Nation (“WIIN”) Act and thus were required parties. The Court explained that “even when an executed water repayment contract *may be voidable* by one party, this *does not mean that it is void.*” NCRA, 2021 WL 5054394, at *8 (E.D. Cal. Nov. 1, 2021) (citing CBD, 2021 WL 600952, at *5 (E.D. Cal. Feb. 16, 2021) (emphasis in original). The Court went on to conclude that “the WIIN Act Repayment Contracts can *create legal rights even in the absence of judicial confirmation.*” NCRA, 2021 WL 5054394, at *8 (emphasis added). Plaintiff’s Opposition to Westlands’ Motion to Intervene takes another shot at this holding, and misses.¹

Plaintiff’s claim that Westlands’ principal Repayment Contract is “non-binding and unenforceable,” in addition to lacking any merit on its face, puts the cart before the horse. Plaintiff’s First Amended and Supplemental Complaint (“FASC”) seeks a declaration that Westlands’ principal Repayment Contract is “void and unenforceable.” FASC, at 58, ¶ E. But Plaintiff’s claim has yet to be adjudicated. Thus, Plaintiff cannot rely on an unproven allegation as a premise for keeping a party to a contract out of a case that seeks to invalidate that contract (particularly, when that premise has already been rejected by the Court). Indeed, it is ironic that Plaintiff claims to have standing to challenge a contract (*id.* ¶¶6-24), while also claiming that the

¹ Westlands noticed a hearing on its Motion for December 23, 2022, 35 days after filing, in compliance with Local Rule 230 and with the understanding from the Court’s Standing Order that the Motion would be decided on the papers without oral argument. Pursuant to the briefing schedule established by the Court’s September 6, 2022 Order, Westlands’ Reply is also due on December 23, 2022.

1 actual party to the contract should not be party to the case.

2 Plaintiff's Opposition fails on other bases. It does not account for, or even address,
3 Westlands' second Repayment Contract with the United States, which has been validated.
4 Westlands' Motion noted that this second Repayment Contract involves a partial assignment of
5 water rights to Westlands from Oro Loma Water District. Mot. at 7, n. 4. Thus, even by
6 Plaintiff's incorrect logic, Westlands has an undisputed "legally protectable interest" in this
7 validated Repayment Contract, which Plaintiff also seeks to "[v]acate, set aside, rescind, and
8 nullify." FASC, ECF No. 97, p. 58, ¶ D. Therefore, Westlands' undeniable protectable interest
9 in this validated contract provides further undisputed grounds for granting Westlands' Motion.
10 Nor does Plaintiff address the potential impact on Westlands' financial interests of Plaintiff's
11 Third and Fourth Claims for Relief, which as noted in the Motion appear to be intended to force
12 Reclamation to levy additional costs on Westlands and other CVP contractors of "at least
13 \$350,872,120.00." *Id.* ¶ 121.

14 Plaintiff's arguments that the WIIN Act authorization has expired, and that Federal
15 Defendants adequately represent Westlands in this case, both hinge on Plaintiff's flawed
16 challenge to this Court's prior on-point rulings. Opp. at 11-13. In addition, Plaintiff fails to
17 acknowledge that, in the *CBD* case, the federal defendants and CVP water contractors offered
18 different arguments in cross-motions for summary judgment on some of the very same issues
19 raised by Plaintiff's FASC. See *CBD*, ECF Nos. 144, 160, 179, 181. This fact decisively shows
20 that Federal Defendants here would not "undoubtedly" make all of Westlands' arguments and,
21 thus, cannot adequately represent Westlands' interests in the case.

22 Lacking any legitimate substantive grounds to block Westlands' intervention as of right,
23 Plaintiff falls back on an argument that the Court should deny permissive intervention because
24 Plaintiff purportedly cannot determine whether Westlands has a claim or defense that shares a
25 common question of law or fact with the main action, since the Motion was not accompanied by a
26 pleading. Opp. at 13-14 (citing Fed. R. Civ. P. 24(c)). Plaintiff's contention is belied by its non-
27 opposition to Westlands' prior motion to intervene, which was not accompanied by a pleading.
28

Pl’s Non-Opp’n, ECF No. 56; Mot. to Intervene, ECF No. 50. And Plaintiff is simply incorrect in light of the Motion itself, which establishes that Westlands seeks to intervene in this action to defend its Repayment Contracts, and by the FASC, which expressly identifies Westlands’ principal Repayment Contract as one that it seeks to invalidate. *See Beckman Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 474 (9th Cir. 1992) (pleading not required where court was otherwise apprised of grounds for intervention).

For the foregoing reasons, which are discussed further below, and those detailed in the Motion, the Court should grant Westlands’ Motion to Intervene as a defendant in this case.

II. DISCUSSION

A. Plaintiff Fails To Distinguish This Court’s Rulings In CBD And NCRA That Westlands Has “Legal Rights” In Its Repayment Contracts, Even In The Absence Of Judicial Confirmation

As explained in the Motion, this Court has previously found (albeit through opinions entered in separate, but related actions) that Westlands has significant protectable interests in the Repayment Contracts, regardless of the status of the state court validation. Mot. at 14-15, citing NCRA, 2021 WL 5054394, at *8 (“The holding in *Concerned Irrigators [v. Belle Fourche Irrigation District]*, 235 F.3d 1139 (8th Cir. 2001)] therefore supports a finding that the WIIN Act Repayment Contracts *can create legal rights even in the absence of judicial confirmation.*”) (emphasis added); *see also CBD*, 2021 WL 600952 at *5. Plaintiff attempts to distinguish this reasoning by claiming that “facts and legal developments addressed herein regarding Westlands’ WIIN Act contract were not raised or at issue in those cases.” Opp. at 11. In particular, Plaintiff points to the Fresno County Superior Court’s March 15, 2022 dismissal of Westlands’ Complaint for Validation Judgment. *Id.* at 10. But that ruling, which is currently on appeal, does not affect the Court’s clear reasoning on this issue.² As the Court explained, “‘even when an executed

² Plaintiff states that it “would not object to the Court’s deferring ruling on Westlands’ intervention motion until after the state court appellate decision.” Opp. at 10, n. 6. Such a deferral would be wholly inappropriate absent a stay given Westlands’ legal entitlement to intervene as of right before its rights are prejudiced in ongoing litigation. Moreover, Plaintiff’s hollow offer belies its supposed concern, expressed earlier in its Opposition, that Westlands’ intervention would supposedly “delay and prejudice Hoopa’s adjudication of its claims.” *Id.* at 6.

1 water repayment contract *may be voidable* by one party, this *does not mean that it is void.*”
 2 *NCRA*, 2021 WL 5054394, at *8, quoting *CBD*, 2021 WL 600952 at *5 (emphasis in original).
 3 The Court went on to note that “there is no allegation or even a suggestion that the United States
 4 disclaims its contractual obligations to the absent contractors.” *NCRA*, 2021 WL 5054394, at *8.
 5 The same is true here. Thus, even without judicial confirmation, Westlands has protectable “legal
 6 rights” in the executed Repayment Contracts. *Id.*³

7 Plaintiff devotes four entire pages to its argument that Westlands should not be entitled to
 8 intervene due to Westlands not having presented to the United States a validation judgment for
 9 one of Westlands’ Repayment Contracts, reciting irrelevant facts and drawing incorrect (and also
 10 irrelevant) conclusions. Most blatantly, Plaintiff repeatedly declares without justification that
 11 Westlands’ Repayment Contracts are “non-binding and unenforceable” under 43 U.S.C. § 511. It
 12 is not until after Plaintiff completes that verbose and misguided recitation that Plaintiff mentions
 13 this Court’s analysis of the issue, and then provides only cursory treatment of it. *Opp.* at 7-11.
 14 Plaintiff does even attempt to square its assertion with this Court’s prior rulings or the United
 15 States’ position, detailed in a letter attached to the FASC as an exhibit, that,

16 the Repayment Contract will govern the rights and obligations of the United States
 17 and the District after the Repayment Contract’s effective date, June 1, 2020,
 18 notwithstanding the District’s inability to obtain a final decree confirming its
 19 proceedings to authorize the execution of this Repayment Contract. See, 43 USC §
 20 511.

21 FASC, ECF No. 97, Ex. 22. Indeed, Plaintiff does not attempt to reconcile its argument with the
 22 Court’s prior rulings or the letter attached to its FASC because it simply cannot.⁴

23 Finally, Plaintiff misconstrues the state court decision denying validation of the contract,

24 ³ As explained below, the parties have been operating under the Repayment Contracts for over two years,
 25 and pursuant to them Westlands has made over \$200 million in the repayment of what the United States
 26 determined was Westlands’ remaining obligation for CVP capital costs.

27 ⁴ Plaintiff also misinterprets Section 46 of the Omnibus Adjustment Act of 1926, 43 U.S.C. § 423e. *Opp.*
 28 at 8. Aside from the fact that, like section 511, section 423e only makes unvalidated contracts voidable,
 not void, section 423e by its plain text only applies to “a new project or new division of a project.”
 Plaintiff makes no showing that converting water service contracts to repayment contracts pursuant to the
 WIIN Act are “new” projects or a division of a project. Even a cursory review of Reclamation Law
 demonstrates that WIIN Act conversions are not “projects” or a “division of a project.” See 43 U.S.C.
 390bb(8). Simply put, section 423e is inapplicable here.

1 incorrectly asserting that the court “found the contract deficient and unlawful.” Opp. at 9. This is
 2 factually incorrect. As is clear from decision itself, the court found that it could not validate
 3 Westlands’ principal Repayment Contract, not as a result of any defect with the contract itself, but
 4 due to findings that: (1) state law did not allow the court to issue a validation judgment, and (2)
 5 Westlands did not provide sufficient evidence to support the requested judgment. *See* Judgment,
 6 ECF No. 105-1 (denying validation because (1) the version of the contract approved by
 7 Westlands’ board of directors prior to execution was only a proposed version and did not include
 8 all key terms, (2) and Westlands did not present sufficient evidence of compliance with the notice
 9 requirements under California’s Brown Act prior to the board meeting that approved the
 10 contract). Nothing in the decision suggests that Westlands’ principal Repayment Contract itself,
 11 which Westlands and the United States have operated under for over two years and continue to
 12 operate under today, was deficient.

13 In any event, Plaintiff’s false assertions do not help it here because Plaintiff has not
 14 directly addressed, much less distinguished, this Court’s finding in two separate related cases that
 15 “the WIIN Act Repayment Contracts can create legal rights even in the absence of judicial
 16 confirmation.” Because Westlands’ legal rights are clearly challenged by Plaintiff in this case,
 17 Westlands has a “significantly protectable interest” relating to the Repayment Contracts that
 18 Plaintiff seeks to invalidate in this action. Thus, the Court should grant Westlands’ Motion.

19 **B. Expiration of the WIIN Act Authorization is Irrelevant Because the United**
 20 **States And Westlands Have Executed And Are Operating Under The**
 21 **Repayment Contracts**

22 Plaintiff offers a theory that Westlands should not be entitled to intervene in defense of its
 23 Repayment Contracts because “the authorization to enter into permanent repayment contracts
 24 under the WIIN Act expired on December 16, 2021.” Opp. at 12. Plaintiff’s argument here is
 25 based on several faulty premises already addressed above and is nonetheless irrelevant because
 26 there is no need to re-execute the Repayment Contracts. According to Plaintiff, “Reclamation
 27 cannot cure the fundamental deficiencies in Westlands’ WIIN Act contract” because the state
 28 court denied validation. *Id.* However, as noted, the state court did not find Westlands’ principal

1 Repayment Contract itself deficient. Further, as also noted, Reclamation has confirmed its
 2 understanding that the Repayment Contract will govern the rights and obligations of the parties,
 3 notwithstanding a lack of validation judgment, and the Court has stated Westlands has legal rights
 4 in the Repayment Contracts even in the absence of validation. Indeed, the parties have been
 5 operating under the Repayment Contracts for over two years and Westlands has made over \$200
 6 million in payments under them. *See* Decl. of A. Lubas-Williams, *CBD*, ECF No. 160-3, at 3.
 7 So, there is no need to re-negotiate or re-authorize the contracts, and Plaintiff's citation to the
 8 expiration of the WIIN Act authorization is wholly irrelevant.

9 **C. Plaintiff Fails To Address Westlands' Interest In Its Second Repayment**
 10 **Contract, Which Has Been Validated**

11 A separate and independent ground for granting Westlands' Motion is its interest a second
 12 Repayment Contract, which has been validated. As noted in the Motion, in addition to
 13 Westlands' principal Repayment Contract with Reclamation, Westlands is a party to a second
 14 Repayment Contract involving a partial assignment of water rights to Westlands from Oro Loma
 15 Water District (14-06-200-7823J-LTR1-P). Mot. at 7, n. 4. This contract has been validated.
 16 Validation Judgment, 5/25/2021, Decl. of C. Larsen, Ex. A. The contract entitles Westlands to up
 17 to nearly 4,000 acre-feet of CVP water annually. *Id.*, Ex. B, §3(a). Although Westlands noted its
 18 interests in this contract in its Motion, Plaintiff's Opposition does not address Westlands' clear
 19 interests in this contract. Nor does it deny that its request that the Court "[v]acate, set aside,
 20 rescind, and nullify *all* of Defendants' contract conversions challenged herein" includes this
 21 Repayment Contract. FASC, ECF No. 97, p. 58, ¶ D (emphasis added). Thus, Westlands'
 22 undeniable protectable interest in this validated Repayment Contract provides further undisputed
 23 grounds for granting Westlands' Motion.

24 **D. Plaintiff's Third and Fourth Claims for Relief Pose A Separate And**
 25 **Independent Threat to Westlands' Financial Interests**

26 Plaintiff does not address the potential impact on Westlands' financial interests of
 27 Plaintiff's Third and Fourth Claims for Relief, which as noted in the Motion appear to be intended
 28 to force Reclamation to levy additional costs on all CVP contractors, including Westlands, of "at

1 least \$350,872,120.00.” Mot. at 14 (citing FASC, Third and Fourth Claims for Relief). It is
 2 unclear from the FASC whether Plaintiff seeks to force Reclamation to levy these additional costs
 3 only on water deliveries under the Repayment Contracts or all CVP water deliveries. Since
 4 Plaintiff did not address this issue, it can only be assumed that Plaintiff seeks to have additional
 5 costs levied on all CVP water deliveries. Thus, Westlands has a clear and undisputed interest in
 6 the adjudication of these claims, independent of its direct interests in the Repayment Contracts.
 7 This is an additional independent ground for granting the Motion.

8 **E. Plaintiff Fails To Rebut Westlands’ Arguments That Federal Defendants**
 9 **Would Not “Undoubtedly” Make All Of Westlands’ Arguments And, Thus,**
 10 **Cannot Adequately Represent Westlands’ Interests.**

11 As also noted in the Motion, this Court easily concluded in *CBD* and *NCRA* that the
 12 potential impairment of the CVP contractors’ interests in those actions could not be “adequately
 13 represented” by the existing defendants in those suits. Mot. at 17-19 (citing *CBD*, 2021 WL
 14 600952, at *6–7; *NCRA*, 2021 WL 5054394, at *10.) Plaintiff tries to distinguish this Court’s
 15 reasoning in those cases by falling back on the same defective reasoning addressed above—that,
 16 according to Plaintiff, this Court’s decisions “do not account for the facts and legal developments
 17 that are unique to Westlands’ WIIN Act contract.” Opp. at 13. But those “developments” do not
 18 impact the Court’s reasoning that led it to conclude that Repayment Contracts can create legal
 19 rights even in the absence of judicial confirmation. Nor does Plaintiff link its underlying
 20 argument that Westlands supposedly lacks an interest in contracts that it has been operating under
 21 for over two years with any substantive points supporting an argument that Federal Defendants
 22 can adequately represent Westlands’ interests here.

23 Plaintiff cites caselaw noting that an intervenor has the burden of proving inadequate
 24 representation. *Id.*⁵ But Westlands’ Motion cites numerous cases and gives numerous examples
 25 demonstrating how Westlands cannot rely on the government to represent its interest and make all
 26 of Westlands’ arguments here. Mot. at 18 (citing cases standing for the principle that government

27 ⁵ As noted in Westlands’ Motion, “the burden of making that showing should be treated as minimal.”
 28 Mot. at 17 (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972)).

1 agencies have a broader public interest than other parties and noting, among other things, that
 2 “[w]hereas Westlands is devoted to a single goal, i.e., preserving its contractual rights under
 3 Repayment Contracts so it can continue to provide CVP water to its water users, Federal
 4 Defendants’ interests are multi-faceted.”). Plaintiff does not address any of this. It is Plaintiff
 5 who has failed to carry its burden.

6 If any more evidence that Federal Defendants cannot adequately represent Westlands’
 7 interest in this case were needed (and, based on the record, none is), this Court need only look to
 8 summary judgment briefing in *CBD*. There, the federal defendants and CVP water contractors
 9 (who the Court ordered joined as defendants) offered different arguments in cross-motions for
 10 summary judgment on the some of the very same issues raised by Plaintiff’s FASC. See *CBD*,
 11 ECF Nos. 144, 160, 179, 181. This fact decisively shows that Federal Defendants here would not
 12 “undoubtedly” make all of Westlands’ arguments and, thus, cannot adequately represent
 13 Westlands’ interests in the case. See *Southwest Ctr. for Biological Diversity v. Babbitt*, 150 F.3d
 14 1152, 1153-54 (9th Cir. 1998).

15 **F. Permissive Intervention Is Appropriate Because Westlands Defense Of Its**
 16 **Repayment Contract Shares Common Questions Of Law And Fact With**
 17 **Plaintiff’s Claims To Invalidate Those Contracts**

18 Plaintiff argues that the Court should also deny permissive intervention because Plaintiff
 19 purportedly cannot determine whether Westlands has a claim or defense that shares a common
 20 question of law or fact with the main action, since the Motion was not accompanied by pleading,
 21 per Rule 24(c). Opp. at 13-14. However, “[c]ourts, including [the Ninth Circuit], have approved
 22 intervention motions without a pleading where the court was otherwise apprised of the grounds
 23 for the motion.” *Beckman Indus., Inc.*, 966 F.2d at 474 (9th Cir. 1992) (citing *Shores v. Hendy*
 24 *Realization*, 133 F.2d 738, 742 (9th Cir.1943); *Smith v. Pangilinan*, 651 F.2d 1320, 1325–26 (9th
 25 Cir.1981)); see also *Westchester Fire Ins. Co. v. Mendez*, 585 F.3d 1183, 1188 (9th Cir. 2009)
 26 (holding that intervenor need not have attached a pleading to motion to intervene when
 27 intervenor’s “interest is obvious. . . . That interest was explicitly identified in [intervenor’s]
 28 motion to intervene. . .); *Peaje Invs. LLC v. García-Padilla*, 845 F.3d 505, 515-16, n.7 (1st Cir.

1 2017) (collecting cases in support of statement that “[s]everal circuits, including our own, have
2 eschewed overly technical readings of Rule 24(c) similar to that applied by the district court
3 here.”).

4 Here, Westlands’ Motion clearly sets forth that Westlands seeks to intervene in this action
5 to defend its Repayment Contracts that the FASC expressly seeks to invalidate. Thus, there are
6 inescapable commonalities of law and fact, since Westlands and Federal Defendants seek to
7 defend contracts that Plaintiff seeks to invalidate. Plaintiff claims that “Westlands’ intervention
8 would delay and prejudice Hoopa’s adjudication of its claims, which are solely against the United
9 States.” Opp. at 14. This contention is belied by Plaintiff’s non-opposition to Westlands’ prior
10 motion to intervene, which was also not accompanied by a pleading. Further, since Federal
11 Defendants have yet to answer the FASC, it makes little sense to require Westlands to submit a
12 proposed answer at this early stage. Nonetheless, in order to remove any doubt that Westlands’
13 defense of its contracts that Plaintiff seeks to invalidate shares common questions of law and fact
14 with the main action, Westlands is submitting a Proposed Answer in conjunction with this Reply,
15 while reserving the right to amend that Answer once it is joined as a party to this case and served
16 with the complaint.

17 **III. CONCLUSION**

18 Westlands has a substantial and undeniable interests in this case. It has been operating
19 under the Repayment Contracts for over two years and has made over \$200 million in payments
20 under them. In exchange, its landowners have obtained significant opportunities that have been
21 recognized by this Court. Clear legal precedent and basic common sense dictate that Westlands
22 must be allowed to participate in the defense of its contracts. For all the foregoing reasons and
23 those detailed in the Motion, the Court should grant Westlands’ Motion to Intervene as a
24 defendant in this case.

1 Dated: December 22, 2022

CYNTHIA J. LARSEN
JUSTIN GIOVANNETONE
ORRICK, HERRINGTON & SUTCLIFFE LLP

3 By: /s/ Cynthia J. Larsen
4 CYNTHIA J. LARSEN
Attorneys for Westlands Water District

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2022, I electronically filed WESTLANDS WATER DISTRICT'S REPLY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANT with the Clerk of Court using the ECF system, which will automatically send email notification to the attorneys of record.

/s/ Cynthia J. Larsen

CYNTHIA J. LARSEN